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EXAMINER
SHERRER, CURTIS EDWARD

ART UNIT	PAPER NUMBER
1761	

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7

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 09/856,435	Applicant(s) WEERASINGHE ET AL.	
	Examiner Curtis E. Sherrer	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *30 August 2001* .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-30* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-29* is/are rejected.

7)☒ Claim(s) *30* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 6 .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Claim Objections

Claim 30 is objected to under 37 CFR 1.75(c) as being in improper form because a multiple dependent claim. Claim 30 is a multiple dependent claim that depends from a multiple dependent claim. See MPEP § 608.01(n). Accordingly, the claim 30 has not been further treated on the merits.

Information Disclosure Statement

The information disclosure statement filed 03/12/02 fails to comply with 37 CFR 1.98(a)(3) because it does not include a concise explanation of the relevance, as it is presently understood by the individual designated in 37 CFR 1.56(c) most knowledgeable about the content of the information, of each patent listed that is not in the English language or cited in the Search Report for the corresponding PCT application. It has been placed in the application file, but the information referred to therein has not been considered.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 4, 7, 8, 14-23 and 27 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 7, 8, 15 and 16 are indefinite because the scope of the term "about " is unknown. These claims are also indefinite because it is not clear what basis these ratios are formed on, i.e., by volume, by weight, etc.

Claim 4 is indefinite because the scope of the term "essentially" is unknown.

Claim 18 is indefinite because the scope of the phrases "warm water" and "hot water" is unknown. Claim 18 is also indefinite because it is not clear which steps are step (b) or (c). See also claim 19 for step (d) and claim 22 for step (a).

Claim 27 is indefinite because the scope of the phrase "as herein defined" is unknown.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-6, 9-14 and 26-29 are rejected under 35 U.S.C. 102(b) as being anticipated by Klose et al. (PCT/US95/13242)(hereinafter Klose).

Klose teaches the production of a ready to freeze alcoholic beverage comprising an alcohol, a flavoring, water, sugar, and a stabilizer blend of locust bean gum, guar gum and optionally pectin. (See Abstract). The frozen beverage can be contained in a flexible plastic pouch consisting of several laminates as disclosed on pages 5 to 6. The ph can be adjusted using citric acid (page 7,m lines 13-23). The alcohol can come from a variety of sources as disclosed

on page 8 to 9. Other ingredients can be included, such as oils, preservatives, and colorants (pages 15-16).

Claims 1-6, 9-14 and 26-27 are rejected under 35 U.S.C. 102(b) as being anticipated by Oshimura et al. (Japanese Pat. No. 4-258282)(hereinafter Oshimura).

Oshimura teaches the use of a gelling agent that "is of at least one kind selected from the group consisting of a combination of agar, . . ., konjac mannan, carrageenan, phaselan [sic], alginic acid, cardolan [sic], pectin, tamarind gum, gelan, locust bean gum, and xanthane gum, and a combination of locust bean gum and galactomannan" (page 2) to produce a frozen liquor. The alcohol used in the product can be "sake (Japanese rice wine), synthetic liquor, shochu (a clean distilled liquor), fruit wine, whiskey, spirits, liqueur, and miscellaneous liquors" (page 4). "Furthermore, as needed, saccharides, (such as sucrose, glucose, fructose, and oligosaccharide), organic acids (such as citric acid, tartaric acid, and succinic acid), brewing alcohols, fruit extracts, fruit juices, vitamins, minerals, food fibers, flavoring, and coloring agents can be added to these liquors to adjust taste" (page 4).

With respect to the gelling agents, Oshimura also states that

> Other gelling agents that are edible and can provide the gelling effect (which is to be described later) can also be employed. The concentration of the gelling agent depends on the gelling agent's purity, the kind of liquor to used, and the additives. Ordinarily, the final product contains 0.02-5.0% by weight of gelling agent; or preferably, 0.05-02.0% by weight gelling agent. If a sufficient amount of gelling agent is not used, the gel structure will not be formed. If an excessive amount of gelling agent is employed, the gel structure becomes too strong. (Page 5).

It is noted that the water content is based on water contained in other ingredients, such as the wine or liquor that is added, and not merely that which comes from added water.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 7, 8, 15, 16 and 18-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oshimura or Klose.

Oshimura and Klose teach that cited above but they do not disclose the claimed ratio of ingredients. It is notoriously well known among those of ordinary skill in the beverage art to modify ingredients in order to produce products that vary in taste, texture, and flavor so as to provide consumers with an array of food products to choose from. It would have been obvious to those of ordinary skill in the art to modify the recipes of Oshimura and Klose so as to produce a variety of products.

Applicants' attention is invited to *In re Levin*, 84 U.S.P.Q. 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

> This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable

> unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 U.S.P.Q. 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 U.S.P.Q. 221.

Further, neither Oshimura nor Klose appear to mix the ingredients in the order claimed. Case law holds that selection of any order of performing process steps is prima facie obvious in the absence of new or unexpected results. *In re Burhans*, 154 F.2d 690, 69 USPQ 30 (CCPA 1946). Selection of any order of mixing ingredients is prima facie obvious. *In re Gibson*, 5 USPQ 230 (CCPA 1930). Therefore, it would have been obvious to one of ordinary skill in the art to modify the sequence of adding the ingredients of Oshimura or Klose.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Curtis E. Sherrer whose telephone number is 703-308-3847. The examiner can normally be reached on Tuesday-Friday, 8AM-6:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are 703-305-3602 for regular communications and 703-305-3602 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

Curtis E. Sherrer
Primary Examiner
January 21, 2003